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CONTINGENT COMPENSATION OF POST- CONVICTION COUNSEL: A MODEST PROPOSAL TO IDENTIFY MERITORIOUS CLAIMS AND REDUCE WASTEFUL GOVERNMENT SPENDING

Christopher T. Robertson, J.D., Ph.D.

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CONTINGENT COMPENSATION OF POST-CONVICTION COUNSEL: A MODEST PROPOSAL TO IDENTIFY MERITORIOUS CLAIMS AND REDUCE WASTEFUL GOVERNMENT SPENDING

Christopher T. Robertson, J.D., Ph.D.^{*}

It costs about \$25,000 per year to pay for the housing, food, medical care, and security for each of the 2.3 million residents of America's prisons.¹ In a world of limited public budgets, each of these expenditures represents an opportunity cost – a teacher's aide not hired, a section of road not widened. Local, state, and federal governments pay such incarceration costs, which amount to \$75 billion in the aggregate, while slashing budgets for essential services for the rest of the citizenry including medical care, biomedical research, infrastructure, and educational funding – investments which arguably provide greater returns to taxpayers.²

It is hard to resist the allure of some form of "justice reinvestment" that would move funds to areas that might produce greater social return, and indeed states have been experimenting with ways to save money by getting prisoners out of prison.³ A Michigan reentry program is saving \$118 million annually.⁴ Texas is saving

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1. JOHN SCHMITT, KRIS WARNER, & SARIKA GUPTA, *THE HIGH BUDGETARY COST OF INCARCERATION 2* (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>; *Direct Expenditures by Criminal Justice Function, 1982–2007*, BUREAU OF JUSTICE STATISTICS, DEPT. OF JUSTICE, <http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm> (last visited Mar. 23, 2012).

2. See, e.g., Phil Galewitz, *More States Limiting Medicaid Hospital Stays*, USA TODAY, Oct. 31, 2011, <http://www.usatoday.com/news/washington/story/2011-10-23/states-limit-medicaid-hospital-stays/50886398/1> (Arizona simply stopped paying for certain organ transplants. Hawaii simply refused to pay for hospital stays of more than 10 days for most patients, regardless of whether the patient can be safely discharged.). See also NAT'L RESEARCH COUNCIL, *STRATEGIES TO LEVERAGE RESEARCH FUNDING: GUIDING DOD'S PEER REVIEWED MEDICAL RESEARCH PROGRAMS 47* (Michael McGeary & Kathi E. Hanna eds., 2004), available at http://nap.edu/catalog.php?record_id=11089 (discussing sharply reduced state funding for biomedical research); Katherine Barrett & Richard Greene, *Grading the States '08: The Mandate to Measure*, GOVERNING, Mar. 2008, at 32-34, available at <http://www.pewcenteronthestates.org/uploadedFiles/Grading-the-States-2008.pdf> (discussing state cuts to infrastructure spending); Phil Oliff & Michael Leachman, *New School Year Brings Steep Cuts in State Funding for Schools*, CENTER ON BUDGET AND POLICY PRIORITIES (Oct. 7, 2011), <http://www.cbpp.org/cms/?Fa=view&id=3569> (discussing state cuts to education spending).

3. See, e.g., Todd R. Clear, *A Private-Sector, Incentives-Based Model For Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL'Y 585 (2011).

4. Glenn Gilbert, *Success of Michigan Prisoner Re-entry Initiative Allows Granholm to Close Prisons, Save Money*, OAKLAND PRESS, Sept. 6, 2009, <http://www.theoaklandpress.com/articles/2009/09/06/opinion/doc4aa2fbfc7c9f4919330267.txt>.

\$210 million by increasing probation and parole as an alternative to incarceration.⁵ Several states recently have created fiscal incentives for local justice systems to reduce their recidivism rates, and the United Kingdom is experimenting with a program to create private-sector competition to reduce the rates of incarceration.⁶ Post-conviction litigation could also serve those goals.

The paper seeks to leverage the cost-savings agenda by observing that, at any given time, a significant number of those incarcerated in state and federal prisons should be released, not as a matter of social policy but simply on account of the facts and law of their cases. Incarcerating these people is government waste, just as when the government builds bridges to nowhere.⁷ Even a purely rational government – with no commitment to liberty or concern about the problem of mass incarceration – would seek to minimize that waste. The problem is that we presently have no way of identifying which prisoners meet that criterion.

This contribution to a symposium on post-conviction litigation argues that the lack of properly-incentivized counsel is a primary problem with our failing system of habeas litigation. The lack of counsel causes a great flood of frivolous petitions by *pro se* prisoners, while also preventing prisoners with meritorious claims from getting relief. The lack of counsel, and more fundamentally, the lack of funding therefor, thus perpetuates the problem of incarceration waste. Government-funded contingent compensation of post-conviction counsel may be the most promising way to help courts identify the bona fide cases deserving of relief, providing more accurate justice and saving money on net.

In Part I, I lay out the problem of incarceration waste, identifying the types of prisoners who should be released even under current law and foreseeable changes thereto. I also show that, without a constitutional or statutory right to counsel, even those prisoners that are being wastefully incarcerated are unable to persuasively reveal that status to their captors.

In Part II, I present a proposal for rational governments to pay post-conviction counsel, but do so through a contingent fee system that would incentivize the attorneys to identify such prisoners and cogently present their cases to prosecutors and courts. Such a contingent funding system would be more politically feasible, since it does not shower money upon prisoners who deserve to be there, and it creates the proper incentives for attorneys to provide a screening function for the most meritorious cases.

In Part III, I identify other structural and doctrinal impediments to governments achieving a rational policy for reducing incarceration waste, and suggest that they be reconsidered through this lens. I conclude that, although government-paid contingent compensation of post-conviction counsel may be a useful way to get representation for those prisoners that have the most meritorious claims, and to save some money for governments on the margins, it is very far from a solution to the overwhelming problem of mass incarceration.

5. *Texas & Mississippi: Reducing Prison Populations, Saving Money, and Reducing Recidivism*, ABA CRIM. JUSTICE SECTION, <http://www2.americanbar.org/sections/criminaljustice/CR203800/PublicDocuments/paroleandprobationsuccess.pdf> (last visited Mar. 23, 2012).

6. See Clear, *supra* note 3 (reviewing these trends).

7. Herein, references to “the government” include federal or state governments.

I. THE PROBLEM OF WASTE INCARCERATIONS

Much dispute attends the theoretical bases for institutionalized prisons, and the United States policy of mass incarceration is the topic of many other papers. One could assert a radical thesis that incarceration is itself wasteful, to the extent that it is a sub-optimal mechanism for addressing the problem of criminality in society. Or, one could assert the somewhat narrower claim that, on the margins, there are certain sorts of criminals for whom any incarceration, or such long periods of incarceration, are unwarranted for meeting social goals of deterrence and punishment. The “war on drugs” or “mandatory minimums,” for examples, may be very bad policies.

Regardless of the merits of the broader claims on criminal justice policy, this paper offers the very modest suggestion that, even within our current paradigm of incarceration law, there are prisoners who should not be incarcerated at all, or not incarcerated for as long as they will be incarcerated. This narrower concept of incarceration-as-waste presents some low-hanging fruit that does not require any broader reexamination of the underpinning of current criminal law and policy.

Understood in this sense, incarceration waste exists because our pretrial and trial procedures do not perfectly sort those that should be incarcerated from those that should not. William Stuntz has previously tied the extent of incarceration to the inadequacy of process protections: “Americans [have] chosen, at least tacitly, to punish millions more criminal defendants than in past generations, [and] we have also chosen to do the punishing with less justification and with sloppier procedures.”⁸ There is a real risk of false positives – those that are in prison but do not belong there.

First, consider factual and procedural problems. Though estimates vary considerably, it is likely that several percent of the current prison population were wrongly convicted in the first place, due to some mixture of false eyewitness testimony, unreliable forensic science, ineffective assistance of counsel, or the misconduct of police or prosecutors.⁹ Some of these facts may only come to light after the trial proceedings are complete. Allegations of ineffective assistance of counsel are often the vehicle for presenting claims of innocence (alleging that

8. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 264 (2011).

9. This literature is vast, but for a recent review, see Jon B. Gould and Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010) (“Virtually no one denies the existence of wrongful convictions, while the several studies on this question cap estimates at around 3% to 5% of convictions.”). For a sense of the controversy compare *Kansas v. Marsh*, 126 S. Ct. 2516, 2538, 165 L. Ed. 429, 456-57 (2006)(J. Scalia concurring, endorsing an estimate that the wrongful conviction rate for felonies is .027 percent, quoting a recent op-ed article by Joshua Marquis, District Attorney of Clatsop County, Oregon) with D. Michael Risinger, *Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 (2006-2007) (estimating “a minimum factually wrongful conviction rate for capital rape-murder in the 1980s” as 3.3%, but suggesting that this is “likely a serious underestimate”). For another leading voice, see Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008) (arguing that precise estimates are difficult, but suggesting “that the frequency of wrongful death sentences in the United States is at least 2.3 percent”). See also *Schlup v. Delo*, 513 U.S. 298, 325-26 (1995) (actual innocence); *Brady v. United States*, 397 U.S. 742, 757-58 (1970) (misconduct).

counsel failed to investigate exculpatory evidence, for example), and several circuits have held that ineffective assistance of counsel claims cannot be raised on direct appeal, but can *only* be raised in post-conviction proceedings.¹⁰ Petitioners raising ineffective assistance claims generally must show prejudice -- that the trial attorney made objectively unreasonable decisions that affected the outcome of the case.¹¹ Thus, to the extent that these prisoners have meritorious claims, they will lead to reductions in prison time. When those meritorious claims about factual innocence and procedural irregularities are not presented, or not presented well, the prisoners remain incarcerated, which is waste.

In addition to the foregoing actual innocence claims and procedural problems, errors in judicial interpretations of the law also create false positives. Periodically, our understanding of the substantive and procedural law changes in ways that undermine the validity of prior convictions. Landmark changes to procedural rights and most changes to the substantive law that effectively decriminalize prior behavior or reduce the sentence therefor, may be retroactively applicable to those who are currently imprisoned.¹²

For example, 18 U.S.C. § 924(c)(1) proscribes the “use” of a firearm in the commission of a drug crime, and prior to 1995, prosecutors and courts had construed that crime broadly to cover situations where the defendant had simply had a gun in the general vicinity of drugs or proceeds. In the 1995 *Bailey v. United States* decision, the Supreme Court instead held that the statute’s “use” element requires the Government to show “active employment of the firearm” in the crime.¹³ Prisoners who had been convicted under the broader reading were thus instantaneously rendered innocent of that crime. Many of these claims had never been considered on direct appeal, or if considered were rejected given clear authority predating *Bailey*. “The United States Sentencing Commission later estimated that between 1,500 and 2,200 federal defendants *per year* had been convicted under the broader reading of the statute that was ultimately rejected by the Court.”¹⁴

In addition to such statutory claims, there are instances in which the Supreme Court, or a lower court, narrows or strikes down a state or federal statute for conflicting with the Constitution.¹⁵ Such a decision makes prisoners instantly

10. See 24 C.J.S. *Criminal Law* § 2242 (2009).

11. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

12. See 28 U.S.C. § 2255(f) (2011) (“The limitation period shall run from . . . the date on which the right asserted was initially recognized by the Supreme Court if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”); *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (holding that cases that either place conduct beyond the power of lawmaking or that create watershed changes in criminal procedure could be applied retroactively to prisoners).

13. *Bailey v. United States*, 516 U.S. 137, 144 (1995). See also *Bousley v. United States*, 523 U.S. 614, 616-24 (1998) (discussing the post-conviction applicability of *Bailey*, and particularly whether the petition should be barred by the notion of procedural default).

14. NANCY J. KING & JOSEPH HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 115 (2011) [hereinafter KING & HOFFMANN, *HABEAS*] (citing Report of Firearms Policy Team, Sentencing for the Possession or Use of Firearms during a Crime (January 2000), 5, <http://www.ussc.gov/publicat/firearms.PDF>).

15. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2931, 2934-35 (2010) (retroactively narrowing the honest services fraud statute on due process vagueness concerns).

innocent as their crimes are struck out of the criminal statutes. Given the Supreme Court's emboldened approach to Constitutional scrutiny in the First Amendment, Second Amendment, and Commerce Clause domains, we might reasonably expect more such Constitutional exonerations in the future.¹⁶

Congress and the Federal Sentencing Commission also sometimes change the sentencing laws or guidelines in ways that retroactively shorten sentences. They did so recently to reduce the differences between prison sentences for crack versus powdered cocaine, a disparity that had an onerous impact upon racial minorities.¹⁷ Many who advocate for changing the national policy of mass incarceration call for similar legislation that could lead to current prisoners getting shorter sentences, in addition to changing sentencing policy prospectively.¹⁸

Altogether then, the government and the prisoner have aligned interests in this subset of cases where the prisoner has a meritorious claim that he should be released prior to the conclusion of his sentence. The prisoner seeks his freedom, and the government seeks to stop wasting funds incarcerating those that should not be incarcerated. Presumably, the government also has a principled commitment to desist from wrongfully incarcerating its citizens, though this commitment may sometimes be less salient for policymakers, who may feel little solidarity with their imprisoned and disenfranchised constituents.¹⁹ Prisoners form the classic insular minority who are unlikely to command the attention of the political process for their own sake.

Even if the government were to acknowledge this fiscal interest in reducing improper incarceration in the aggregate, the problem is that the government does not know, with particularity, which of its millions of prisoners should be released. In fact, even the prisoner himself often will not know whether he has a meritorious claim for release (although he may well hope and believe). Both these parties need help in order to discover whether their interests are in fact aligned. But particularized information is costly. That information simply does not exist until an attorney -- who takes the time and some outlay of expenses to investigate the facts and law of the case -- creates that information.

16. See, e.g., *United States v. Stevens*, 130 S. Ct 1577, 1582-83, 1593 (2010) (using the First Amendment to strike down the statute proscribing creation, sale, or possession of depictions of animal cruelty); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (using the Second Amendment to strike down gun laws). As of the time of this writing, it appears that the Supreme Court has some likelihood of striking down the Affordable Care Act, on Commerce Clause grounds. A vast portion of federal crimes are justified on that same Constitutional basis.

17. John Schwartz, *Drug Terms Reduced, Freeing Prisoners*, N.Y. TIMES, Nov. 1, 2011, <http://www.nytimes.com/2011/11/02/us/terms-for-crack-cocaine-reduced-freeing-prisoners.html> (discussing the reforms to the crack cocaine sentencing disparity in the Fair Sentencing Act of 2010 and the Federal Sentencing Commission's decision to make those changes retroactive). See also Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 2011 J. INST. JUST. INT'L STUD. 87, 97 (discussing Federal Sentencing Commission estimates that retroactive application would affect over 12,000 prisoners).

18. See, e.g., Marc Mauer, *Sentencing Reform Amid Mass Incarcerations-Guarded Optimism*, CRIM. JUST., Spring 2011, at 27-28; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1286 (2004).

19. See generally, Rosanna M. Taormina, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PENN. L. REV. 431 (2003).

An attorney is essential to a successful post-conviction petition.²⁰ “Proceeding *pro se* is particularly dangerous because state [and federal] post-conviction procedures are generally marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly skilled counsel.”²¹ It is particularly dangerous to proceed *pro se* or with unskilled post-conviction attorneys, because a botched job may actually make matters worse, effectively waiving whatever claims the prisoner could have made properly.²²

Public defenders’ focus their efforts on plea negotiations, trials, and direct appeals, not on post-conviction litigation, and the budgets of non-profit organizations and law school clinics can barely scratch the surface of the prison population.²³ Thus, for a prisoner to get post-conviction counsel, he or she must be able to pay for it. This is, of course, a significant challenge for a prisoner who may have been impoverished prior to his arrest, and even if wealthy may have bankrupted himself paying trial and appellate counsel. Once in prison, the few dollars a day working in the prison laundry, at less than even the minimum wage, do not even start to pay the rates demanded by skillful post-conviction counsel.²⁴

Oddly, over half the states have statutes allowing compensation for those who are wrongly convicted and later exonerated, but no compensation for the attorneys who achieve that outcome.²⁵ Federal capital defendants do have some statutory rights to compensated counsel.²⁶ Some states provide very minimal compensation for attorneys representing capital prisoners, but most states provide no

20. See Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 349 (2003) (“These recent changes [to the post-conviction relief statutes] place an incalculable premium on competent representation by talented, adequately funded lawyers.”).

21. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 354 (2006).

22. See *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) (holding that indigent defendants have no remedy for claims that are barred by a post-conviction lawyer’s malpractice).

23. Diane E. Courselle, *When Clinics Are “Necessities, Not Luxuries”: Special Challenges of Running a Criminal Appeals Clinic in a Rural State*, 75 MISS. L. J. 721, 726-27 (2006) (“Given its limited resources and some legal restrictions, the state public defenders handle very few state post-conviction and no federal post-conviction matters The hardest part of the task is learning to turn down possibly meritorious post-conviction cases, even though without the clinic’s help an inmate may have no other resources for assistance.”).

24. See, e.g., *Vanskike v. Peters*, 974 F.2d 806, 811 (7th Cir. 1992) (holding that prisoners are not entitled to federal minimum wage protections).

25. See *Reforms by States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView1.php> (last visited Mar. 23, 2012) (select “State Compensation Laws” from the drop-down menu).

26. For indigent federal prisoners seeking to vacate a death sentence, 21 U.S.C. § 848(q)(4)(B) (2011) entitles them to appointed counsel. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 22 U.S.C. § 2261(b)-(c) (2011) (“AEDPA”), incentivizes states to create a system for the “appointment, compensation, and payment of reasonable litigation expenses of competent counsel” in capital cases, in exchange for a dramatically shorter statute of limitations. However, few (or no) states have taken advantage of this provision. See Betsy Dee Sanders Parker, *The Antiterrorism and Effective Death Penalty Act (“AEDPA”): Understanding the Failures of State Opt-in Mechanisms*, 92 IOWA L. REV. 1969, 1981 (2007)).

compensation at all for non-capital prisoners.²⁷ A plurality of the Supreme Court has said that there is no federal constitutional right to counsel in post-conviction proceedings, even for death-sentenced inmates.²⁸ The statutes provide that federal prisoners are not entitled to appointed counsel unless they can first formulate a compelling claim for relief that itself requires effective discovery and/or an evidentiary hearing, or alternatively if they can persuade the court that “interests of justice so require.”²⁹ Of course accomplishing these predicate tasks would normally require the skills and resources of an attorney, making it an exquisite Catch-22.

It is therefore not surprising that the vast majority of post-conviction petitions are written by prisoners *pro se*, and thus it is not surprising that most petitions fail, often without even reaching the merits.³⁰ All this chaff hides any wheat, and wastes judicial resources too. Meanwhile, many meritorious post-conviction claims are never even asserted, since only an attorney would recognize the basis for relief.

It thus seems clear that the lack of legal representation is a large part of the problem with post-conviction litigation.³¹ Many *pro se* petitions fail to meet rudimentary standards of comprehensibility, much less present colorable legal arguments.³² In capital cases, 92.9% of the petitioners have attorneys, but in non-capital cases, only 7.7% have attorneys.³³ A simplistic comparison of outcomes shows that the capital defendants are 35 times more likely to get relief (12.4% of the time versus 0.35% of the time).³⁴ While it is possible that this difference in outcomes is because capital cases are more prone to error, or that courts are more receptive to capital defendants, some of that disparity is likely due to the fact of

27. John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 276 n.97 (2006). See also *Olive v. Maas*, 811 So.2d 644, 650 (Fla. 2002) (discussing Florida’s provisions for compensation of post-conviction counsel in death penalty cases).

28. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). But see *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999) (holding that state capital prisoner is entitled to appointed counsel).

29. Rebecca C. Raquet & Sara Stainback, *Habeas Relief for State Prisoners*, 89 GEO. L.J. 1832, 1870-71 (2001) (citing 18 U.S.C. § 3006A(a)(2)(B) (2000)).

30. See *Stevenson*, *supra* note 21, at 355; KING & HOFFMANN, *HABEAS* *supra* note 14, at 81-82 (discussing the low rates of success), 147 (showing that 92% of non-capital petitioners proceed without counsel).

31. Nonetheless, scholarship on the efficacy of representation is mixed in its findings and in its reliability. See, e.g., Daniel J. Greiner & Cassandra Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?* 121 YALE LAW JOURNAL (forthcoming 2012) (reviewing this literature and presenting a randomized trial of efficacy in the civil context) and Daniel J. Greiner, Cassandra Wolos Pattanayak, & Jonathan P. Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, HARV. L. REV. (forthcoming 2012), available at SSRN: <http://ssrn.com/abstract=1948286> or <http://dx.doi.org/10.2139/ssrn.1948286>.

32. See Joseph Hoffman & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, April 16, 2011, <http://www.nytimes.com/2011/04/17/opinion/17hoffmann.html?pagewanted=all> [hereinafter Hoffman & King, *Justice*] (“Because more than 90 percent of all non-capital habeas petitions are filed by prisoners acting as their own lawyers, the petitions are often difficult to decipher in the first place.”).

33. See KING & HOFFMANN, *HABEAS*, *supra* note 14, at 147.

34. *Id.* There appears to be no prior scholarly research providing a more sophisticated analysis of the impact of representation in the post-conviction context. See generally Greiner & Pattanayak, *supra* note 31 (reviewing the substantial literature in a variety of other fields).

representation, which is so disproportionately distributed across those two groups. Although far from a complete analysis, this data suggests that representation of non-capital prisoners could lead to a small, but significant, number of releases.

II. COMPENSATION OF POST-CONVICTION COUNSEL AS A SOLUTION

These observations suggest that state and federal governments are sub-optimally incentivizing the production of post-conviction counsel services to accomplish the rational goal of identifying and eliminating wasteful incarcerations. From a strictly rational and fiscal point of view, government should invest in the production of this sort of information insofar as the cost of that information is lower than the cost of continued incarceration.

The most obvious way to undertake such a program of investment would be for the government to significantly increase its funding for the public defender system, so that the public defenders could allocate a significant portion of their work to post-conviction litigation. The advantage of this approach is that public defenders already have a familiar place and expertise in the American system of criminal litigation. A disadvantage is that public defenders lack any incentive to pursue such cases vigorously, and the salaries offered by these offices may fail to attract the strongest candidates to undertake this highly-complex work.³⁵ More importantly, we lack any clear sense of what level of investment in such an office would be optimal, since we are unaware of how many meritorious claims exist and how much work and skill will be required to reveal them. And finally, it seems that additional spending on public defenders may be politically infeasible, as it is a crude policy that seems to serve the guilty more than the innocent.

Alternatively, a program of investment could be based on the private market for legal representation and based on a contingent fee paid if, and only if, an attorney succeeds in reducing the sentence of a prisoner. This reduction in sentence, and thus a reduction in the government's cost of incarceration, would create the corpus from which to pay the attorney. The fee could be based on a simple proportion of that estimated amount saved, say 50%. Alternatively, like the statutory fee paid to civil rights attorneys for prevailing parties, the payment could be based on a "lodestar" rate, derived from a reasonable hourly rate but multiplied by a factor to recognize the low chances of prevailing.³⁶ The award could still be capped, however, by the estimated amount saved by the government, again to ensure that this program is money-saving on net. The attorney securing the release would have the burden of proving his entitlement for fees, just as in other litigation.³⁷

35. See *New Findings on Salaries for Public Interest Attorneys*, NALP (September 2008), <http://www.nalp.org/2008sepnewfindings> (tables showing that public defenders are paid salaries significantly lower than attorneys at private law firms, for example in 2008, \$47,000 for an entry-level public defender versus \$80,00 for a private attorney at the smallest-sized firm and up to \$145,000 at larger firms).

36. See *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992) (discussing lodestar in civil rights context). See also Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 636-37 (1993) (discussing the Independent Counsel Act, which provides contingent compensation to attorneys who represent executive branch officials who are subject to investigations).

37. See 20 C.J.S. *Costs* § 169 (2009) (party requesting fees has burden).

The advantage of a contingent fee is that it incentivizes precisely what the government needs – a search function in which attorneys efficiently sort the wheat from the chaff, identifying those prisoners that have meritorious claims for post-conviction relief. Such contingently-funded attorneys will have no incentive to clog the courts with frivolous claims for post-conviction relief, since any such claim would require the investment of time and money without promise of return.³⁸ Because the payment is only triggered by a recognition that the prisoner should not be imprisoned, such targeted and purposeful public funding may be more politically feasible than unconditional funding for public defenders, whose professional obligation will invariably be to help the innocent and guilty alike.

This proposal encounters the ethical rule against attorneys accepting contingent fees for criminal work, embodied in Model Rule of Professional Conduct 1.5(d)(2). The rule provides that, “[a] lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case.”³⁹ Arguably, its plain language would not apply to the post-conviction setting, since a prisoner is no longer a defendant in a criminal case, but is instead a petitioner in a civil case (albeit one seeking to overturn his criminal conviction).⁴⁰ In addition, even in formal terms, the arrangement is not a contingent representation from the client, but a government offer for the successful representation of the innocent.

Even supposing that the rule would apply to cases like this, there are good reasons to think that it should not. Historically, scholars and policymakers were hostile to contingent fee arrangements generally, but the proscriptions have been eroded in almost every sector, except for criminal litigation.⁴¹ In a seminal article on the rule, Pamela Karlan has argued that “courts and commentators have offered only sketchy justifications for” maintaining the rule in the criminal context.⁴² The one official justification for the rule appears in the Model Code’s Ethical Consideration 2-20: “Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.”⁴³ Aside from the merits of this justification, it obviously does not apply to the present proposal for public funding of post-conviction counsel, which is motivated by the idea that there is in fact a *res*, namely the savings from the cost of incarceration.

38. Compare Hoffman & King, *Justice*, *supra* note 32 (stating that “the never-ending stream of futile petitions suggests that habeas corpus is a wasteful nuisance” under the status quo), with Karlan, *supra* note 36, at 630 (discussing a similar dynamic in civil cases: “commentators generally assume that this sort of gatekeeping in damages cases is good, at least insofar as it screens some cases *out* of the system, because it provide[s] the first line of defense against frivolous litigation.” (internal quotation marks omitted)). See also A. C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1174-76 (1997) (arguing for contingent payment for government-funded appellate counsel in order to create proper incentives to invest in the most meritorious cases).

39. MODEL RULES OF PROF’L CONDUCT R. 1.5(d)(2) (2011).

40. See *White v. Thaler*, 610 F.3d 890, 897 (5th Cir. 2010) (noting that civil procedures apply to Section 2255 petitions).

41. See Karlan, *supra* note 36, at 602.

42. *Id.*

43. *Id.* (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 2-20(2) (1983)).

A second traditional justification for the ban on contingent fees is that in criminal cases, unlike civil cases, defendants enjoy a Constitutional right to counsel (paid by the state if necessary), making the contingent-compensation of counsel unnecessary.⁴⁴ The thinking is that a contingent fee, which the rule-writers saw as inherently suspect, is just not necessary in this context. However, as already noted, there is no Constitutional right to counsel in the post-conviction setting.⁴⁵

In light of these failures of the traditional justifications, Karlan provides her own alternative justifications for the ban on contingent fees in criminal litigation. One concern is cross-subsidization of the costs of defense, in a way that seems normatively troublesome. The problem is that contingent criminal fees would cause those who succeed in litigation and thus pay the fee – those defendants adjudged to be innocent, to cross-subsidize the costs of litigation for those who fail in litigation – defendants adjudged to be guilty.⁴⁶ This concern clearly does not apply to the present proposal since the government pays the contingent fee rather than the innocent person.⁴⁷ There is no problem of cross-subsidization across defendants.

Karlan also argues that the gatekeeping function inherent in contingent fees, whereby attorneys are incentivized to select the cases with the best chances of success, would be inappropriate in the criminal setting. “To permit, let alone systematically encourage, attorneys to choose clients based upon an assessment of guilt or innocence would mean that ‘[t]he private judgment of individual lawyers would in effect be substituted for the public, institutional judgment of the judge and jury.’”⁴⁸ Karlan acknowledges that this concern is predicated on “the constitutional entitlement to counsel accorded *all* criminal defendants,” which does not apply here.⁴⁹ Thus, the idea that attorneys would sort frivolous from meritorious claims, and focus their efforts on the latter, is not problematic. Instead, it is exactly what we need – someone to perform the function of revealing which prisoners’ incarcerations are wasteful. For these reasons, it appears that Rule 1.5(d)(2) would not and should not bar the government from paying post-conviction attorneys conditional on success.⁵⁰

One problem with my proposal to think about post-conviction litigation as a means of cost savings is that incarceration is conducted on an industrial scale,

44. *Id.* at 603-04.

45. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

46. Karlan, *supra* note 36, at 625 (“Thus, if innocent defendants choose a contingent fee arrangement, they will pay a premium tied not only to error costs in their class of cases, but also to the lawyer’s need for compensation in cases in which the system reaches *accurate* verdicts against guilty defendants.”).

47. Karlan herself endorses the concept of a government-paid bonus system for defense counsel. *See id.* at 634-35.

48. *Id.* at 631 (quoting Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10 (1975)).

49. *See id.* at 630.

50. For other discussions of the ethical prohibitions, see generally Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498 (1992); Adam Silberlight, *Gambling with Ethics and Constitutional Rights: A Look at Issues Involved with Contingent Fee Arrangements in Criminal Defense Practice*, 27 SEATTLE U. L. REV. 805 (2004); and Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699 (2001).

where the marginal cost to imprison one extra person may not be the same as the average cost. The bonds on the buildings must still be repaid, and the guards must still come to work, regardless of whether one person succeeds in getting his sentence shortened or overturned.⁵¹ Still, many states have already squared this circle by enacting “pay to stay” laws, which calculate an approximate cost per inmate and then impose it upon those few inmates that are able to pay those costs.⁵² While such laws are often symbolic (since most prisoners are destitute), they suggest that it is possible to put a sizeable dollar figure on a day of incarceration.

State and federal governments are also increasingly using private prisons.⁵³ In that context, the problem of determining a meaningful and sizeable marginal-cost of imprisonment disappears because “almost all the planned or existing private prisons operate on a per-diem, per capita basis.”⁵⁴ Thus, for jurisdictions that have outsourced their incarceration function with these sorts of contracts, each prisoner released creates a direct reduction in expenditures. Marginal cost is average cost in that situation.

Some governments also have severely overcrowded prisons, and are facing judicial mandates to dramatically reduce prison populations.⁵⁵ These governments should be interested in any proposal that could reduce prison populations, even if only in modest numbers. They should be particularly interested in removing the prisoners that do not belong there in the first place, since “high recidivism rates must serve as a warning that mistaken or premature release of even one prisoner can cause injury and harm.”⁵⁶ The present proposal is a narrow and tailored way to reduce prison populations, focusing on those who do not belong there anyway. While the proposal does not purport to solve larger issues of incarceration policy or overcrowding, it does help on the margin.

For the remainder of governments, my proposal relies on the hope that post-conviction litigation may reduce enough sentences to create an aggregate cost savings. If the economic argument ultimately founders, one might retreat to the familiar position that government should err on the side of liberty, getting people out of prison that do not belong there.

51. See Clear, *supra* note 3, at 592 (discussing another proposal for using incentives to reduce incarceration: “If 1 year of incarceration costs an average of \$40,000, then the 16 people who do not go to prison will ‘save’ \$640,000. These savings are not real, of course, because diverting 16 people from prison does not enable the corrections system to close a prison, so its budget remains essentially unaffected”).

52. See Joshua Michtom, Note, *Making Prisoners Pay For Their Stay: How A Popular Correctional Program Violates The Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 188-89 (2004) (“The first state to enact legislation allowing the recovery of general incarceration costs was Michigan, in 1984. Since that time, at least fifteen other states have enacted similar laws.”).

53. See Paul Guerino, Paige M. Harrison, and William J. Sabol, U.S. Department of Justice Bureau of Justice Statistics, *Prisoners in 2010*, 7 (revised 2012) <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf> (“About 16% of federal prisoners (33,830) and nearly 7% of state prisoners (94,365) were housed in private facilities[.]”).

54. David Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 831, n.92 (1987).

55. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011) (holding that California’s overcrowded prisons violate the Eighth Amendment).

56. *Id.*

III. OTHER IMPEDIMENTS TO REDUCING INCARCERATION WASTE

Even if the government invested optimally in creating advocates for the prisoners that should be released, there are other structural, statutory, and doctrinal impediments to securing such releases at optimal rates. These suggest further opportunities for reform once governments take seriously the problem of incarceration waste.

The first problem is that the habeas decisionmakers may be unable to assess the merits of petitions objectively. Confirmatory bias is the psychological dynamic by which people tend to discount information that conflicts with what they believe and to instead focus upon information that coheres with what they already believe.⁵⁷ The federal habeas statutes are a recipe for such bias because they send petitioners back to the same prosecutors and judges that made the original mistakes, wrongly interpreting a statute or wrongly crediting the testimony of a lying witness, for examples.⁵⁸

The quickest and cheapest way to resolve a case of incarceration waste is for a prisoner to garner the prosecutor's consent to his release, and in a time of fiscal austerity, one could imagine government executives exercising their discretion to instruct their line-prosecutors to consent to a prisoner's release when he or she presents a colorable claim. Of course, without such executive-level direction, line prosecutors will routinely resist any suggestion that the prisoner that they worked so hard to put away should be released, as that would mean that the prosecutor had been part of a terrible injustice.⁵⁹ In order to get a more objective assessment of whether incarceration waste exists, the government could place the review of post-conviction petitions in the hands of an independent office, not unlike the Office of the Inspector General, which roots out waste in other federal government agencies.⁶⁰ One could also imagine a rational government reinstituting the use of parole boards and expanding their discretion to consider claims that the law requires release.⁶¹ Such uses of executive discretion are likely to be cheaper to the government than litigation in the courts.

57. See Alafair Burke, *Neutralizing Cognitive Bias: An Invitation To Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 516-18 (2007); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138-48 (2004).

58. Section 2254 requires that state prisoners first exhaust their remedies in state court, and then the federal courts defer strongly to state court determinations. 28 U.S.C. § 2254 (2011). Section 2255 requires filing in the district court that imposed the original sentence, regardless of the prisoner's place of incarceration. *Id.* § 2255(a) (requiring that the petition be filed in "the court which imposed the sentence").

59. For example, even after the Supreme Court narrowed the firearms use statute in *Bailey*, a subsequent defendant convicted under that statute, Kenneth Bousley, still had to go all the way back to the Supreme Court to get relief. *Bousley v. United States*, 523 U.S. 614, 616-18 (1998) (discussing the post-conviction applicability of *Bailey*). There are contrary examples, where prosecutors themselves became champions for releasing innocent prisoners. See Mark Godsey, *False Justice and the 'True' Prosecutor: A Memoir, Tribute, and Commentary*, 9 OHIO ST. J. CRIM. L. 789 (2012).

60. See *Winters Ranch P'ship v. Viadero*, 123 F.3d 327, 330 (5th Cir. 1997) (discussing the Inspector General Act of 1978).

61. See generally, Dhammika Dharmapala, Nuno M. Garoupa, & Joanna Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing* 62 FLA. L. REV. 1037, 1045-47 (2010) (discussing the historical movement away from parole board discretion).

If an entreaty to the prosecutor fails, a post-conviction petitioner then asks the trial court to admit that it deprived the petitioner of his due process rights, misinterpreted the law, or otherwise somehow failed to reach the right outcome in the case. The judge reviewing the post-conviction petition is likely also to suffer from confirmatory biases, no matter how hard she tries to be fair. Obviously a judge would disqualify herself if she thought she would be biased, but as the Supreme Court has recognized, “[b]ias might exist in the mind of one who was quite positive that he had no bias.”⁶² The Supreme Court has also recently held that due process is violated when a judge decides a case where there is a strong appearance of possible bias.⁶³ In this light, it is anomalous for our post-conviction statutes to give trial judges the primary task of determining whether error occurred in their own prior cases.

To make matters worse, appellate review of post-conviction denials is very circumscribed. The petitioner is not even allowed to appeal the trial court’s decision on the petition, unless the trial court or circuit court grants him permission to do so.⁶⁴ In the rare instance that a petitioner gets a “certificate of appealability”, he then must go back to the same court of appeals – and often the very same panel – that denied his direct appeal.

If legislators were to take seriously the problem of incarceration waste, they might consider changing the venue requirements to instead allow fresh eyes to review convictions, at least in those cases where attorneys have identified cases as being potentially meritorious, worthy of investment of their own time. The disadvantage of such a venue change is that the new judge may lack familiarity with the facts of a case, which the prior judge may have. Of course, this is a contingent claim that would seem to depend on a particular judge having accurate and useful memories of one case, out of the thousands he has processed. In many cases, where memories are limited, the judge will need to be provided with the facts through briefing and perhaps an evidentiary hearing. While facts can be provided to a new judge, nothing can remove the confirmatory bias from the mind of the prior judge. Thus, on net, a change of venue seems likely to serve accuracy in post-conviction determinations, and be close to neutral with regard to efficiency.

Aside from the venue statutes, there are also a variety of judicial and statutory doctrines that perpetuate incarceration waste, purportedly to promote “finality” in criminal sentencing. One such impediment is the statutes of limitations, which prevent meritorious, but stale, claims from being heard. The allowed periods tend to be very short. For example the federal period for post-conviction petitions is one-year, which is on the short range for such statutes generally and indeed one fifth of the five-year period that prosecutors enjoy to put people into prison in the first place.⁶⁵ Aside from the facial disparity, the short period is particularly onerous for petitioners who are imprisoned, without income or access to attorneys.

62. *Crawford v. United States*, 212 U.S. 183, 196 (1909).

63. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (a case where a state court judge had benefited from significant campaign contributions from a litigant).

64. 28 U.S.C. § 2253(c)(2) (2012).

65. *See* 28 U.S.C. § 2255(f) (2012) (creating a one-year period for filing post-conviction petitions); 18 U.S.C. § 3282(a) (2012) (creating a default period of five years for prosecution of most federal crimes).

Does a short statute of limitations make sense in this context? Notably, the incarcerating government is not like a civil defendant who seeks “repose,” a confidence that he will not face future liability. Instead, the government is making payments on a judgment every month for the costs of incarceration. From this perspective, a statute of limitations may be irrational, to the extent that it prevents meritorious claims from being heard. If it is justified at all, a short statute of limitations must serve the government’s interest in minimizing transaction costs, allowing courts and prosecutors to quickly dispose of the non-meritorious cases. For the reasons suggested above, however, it is unlikely that contingently-paid attorneys would bring many such cases.

Although the structure and statutes for post-conviction review are onerous, several court-made doctrines further circumscribe the possibilities for reducing incarceration waste. Supreme Court doctrine has held that most reforms to criminal procedure will not be retroactively applicable to other petitioners whose rights were admittedly violated prior to the Supreme Court recognizing that their rights were violated.⁶⁶ The doctrine of non-retroactivity ensures that people will continue to be imprisoned who otherwise would be released if the contemporary understanding of the applicable law were applied to their cases. Without any basis in the statutory law, the judiciary has unilaterally decided that it will not consider such cases, and thereby externalizes the cost of incarceration onto the taxpayers.

The court-made doctrine of “procedural default” likewise functions to keep people in prisons who should not be there, according to our contemporary understandings of the law.⁶⁷ The idea is that a defendant who has failed to raise a challenge on appeal cannot later benefit from the Supreme Court deciding in another case that the challenge was meritorious. There are certain exceptions, predicated on whether the defendant can show that the question goes to the trial court’s jurisdiction, or that the defendant had cause for not raising it and was prejudiced, or finally that he is “actually innocent.”⁶⁸ The Supreme Court has (sometimes) said that, even though a claim may have been entirely futile, that does not demonstrate “cause” for failing to assert it.⁶⁹

Moreover, the Supreme Court has articulated the “actual innocence” standard oddly and incoherently. District courts are supposed to prognosticate about whether any “reasonable” juror would convict in light of the changed law and new evidence, rather than discerning what a full jury of twelve would decide, as guaranteed by the Constitution.⁷⁰ Even though “properly instructed” jurors would presume innocence and place the burden on the prosecutors, the Supreme Court

66. See *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (holding that only those cases that place conduct beyond the power of lawmaking or that create watershed changes in criminal procedure could be applied retroactively to prisoners).

67. See *Bousley v. United States*, 523 U.S. 614, 616 (1998).

68. See generally, *id.*

69. *Id.* at 623. But see *Reed v. Ross*, 468 U.S. 1, 13 (1984) (where “the state of the law at the time . . . did not offer a ‘reasonable basis’ upon which to challenge the [plea],” [it] constitutes ‘cause for failing to raise the issue at that time.’”).

70. Compare *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (petitioner must demonstrate that “no reasonable juror would have convicted him.”) with U.S. CONST. art. III and U.S. CONST. amend. VI (right to a jury trial) and *Ballew v. Georgia*, 435 U.S. 223 (1978) (the Constitution requires a jury of twelve) and *Andres v. U.S.*, 333 U.S. 740 (1948) (the jury’s verdict must be unanimous).

seems to require that the petitioner prove his innocence, under a new standard to which he never confessed guilty.⁷¹ In that inquiry, the Supreme Court sometimes says that the trial court should consider even inadmissible evidence, and other times suggests the contrary.⁷² Further, even individuals who are indisputably innocent of the crime of their conviction nonetheless will continue to be incarcerated, unless they can prove their innocence of other charges, which the government has never even brought or proven.⁷³ These other hypothetical charges can become the post-hoc justification for continued incarceration, unless the petitioner can prove his innocence thereof, without the benefit of a right to a jury, which is somehow waived by pleading guilty to other (invalid) charges. Even aside from fundamental fairness and due process, the idea of incarceration waste suggests that the prosecutors should instead bear the burden of showing why public funds should continue to be used to incarcerate someone who is actually innocent of the crime of their conviction.

There is thus a range of statutory and court-made obstacles to rooting out incarceration waste. Of course, there are also costs to consider on the other side of the ledger. Post-conviction review imposes a burden on prosecutors and courts, and sometimes it may be more efficient to simply deny prisoners a meaningful review. (Whether it is just or fair is of course another question.) Still, the idea of incarceration waste suggests that, even aside from notions of fundamental fairness, there are reasons to keep open the doors to post-conviction review. And, besides, the contingent funding of post-conviction attorneys is likely a more accurate and efficient way to sort the wheat from the chaff.

IV. CONCLUSION

This symposium article has argued that a lack of counsel is a primary problem with our failing system of post-conviction litigation, and the idea of incarceration waste presents a counterbalance to the traditional preference for finality in criminal sentences. Just as other forms of governmental waste can be efficiently rooted out and extirpated from state and federal budgets, the wrongful incarceration of prisoners – who do not belong there, under even our current understandings of the law, can also be excised.

To be sure, contingent compensation of post-conviction counsel is not the solution to our irrational system of mass incarceration. That will take changes to substantive criminal laws and sentencing policy, along with more aggressive efforts to exonerate the wrongfully convicted.

The idea of incarceration waste is a modest reminder that the government and some of the imprisoned have aligned interests in identifying those that should be

71. *Compare Bousley*, 523 U.S. at 624 (putting the burden on “petitioner [to] demonstrate ... that he did not ‘use’ a firearm as that term is defined in *Bailey*”) with *Taylor v. Kentucky*, 436 U.S. 478 (1978) (trial court’s failure to give instruction on presumption of innocence resulted in violation of defendant’s right to fair trial.).

72. *Compare Bousley*, 523 U.S. at 624 (“the Government is not limited to the existing record but may present any admissible evidence of petitioner’s guilt”) with *Schlup*, 513 U.S. at 327-28 (“the district court is not bound by the rules of admissibility that would govern at trial”).

73. *See Bousley*, 523 U.S. at 624 (requiring that the petitioner prove innocence of “foregone charges”).

released. A rational government would, *at the very least*, provide contingent funding to attorneys who successfully perform that service, and moreover review its other statutes and doctrines that place unreasonable impediments on the achievement of this policy goal.